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Supreme Court, U.S.
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No. 99-2036

IN THE
Supreme Court of the United States

THE GOOD NEWS CLUB, *et al.*,

Petitioners,

v.

MILFORD CENTRAL SCHOOL,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE NATIONAL COUNCIL OF CHURCHES, THE BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS, THE GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS, THE REORGANIZED CHURCH OF JESUS CHRIST OF LATTER DAY SAINTS, THE AMERICAN MUSLIM COUNCIL, THE FIRST CHURCH OF CHRIST, SCIENTIST, THE GENERAL ASSEMBLY OF THE PRESBYTERIAN CHURCH (U.S.A.), THE GENERAL BOARD OF CHURCH & SOCIETY OF THE UNITED METHODIST CHURCH, AND THE A.M.E. ZION CHURCH AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether a policy that generally permits members of the community to use public facilities after school hours for educational, social, civic, and recreational purposes, but excludes any person or group that desires to use school facilities for religious purposes, violates the First Amendment's protection for free speech.

2. Whether such a policy violates the First Amendment's protection for the free exercise of religion.

3. Whether a government policy requiring public officials to draw fine distinctions between "religious instruction" and "discussion of moral issues from a religious viewpoint" violates the Establishment Clause of the First Amendment.

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INTERESTS OF *AMICI CURIAE*

Amici are a diverse group of churches and other religious organizations that conduct religious activities, hold worship services, or otherwise assemble at public facilities. Sometimes *amici* rent a public facility for use by a congregation that is new or whose usual meeting place is under renovation. At other times they may use such a facility for community outreach and education, *e.g.*, Bible study seminars, healthful living programs, and family life presentations.

In so doing, *amici* seek no special favors. Nor do they seek to use these facilities in a way that ignores legitimate concerns about the fact or appearance of a religious establishment. What they seek, instead, is equal access, *i.e.*, access on the same terms as other community groups, and provided in a way that respects the need for an appropriate separation between church and State.[1]

STATEMENT

This case resurrects an issue that *amici* and most other religious groups thought had been laid to rest in *Lamb's Chapel* v. *Center Moriches Union Free School District*, 508 U.S. 384 (1993): whether a State can exclude religious programs from public facilities that are otherwise available for a broad range of similar, but secular, programs and events. In *Lamb's Chapel*, this Court unanimously ruled that such exclusions violate the free speech rights of religious groups

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[1] A complete list of *amici*, with descriptions of each organization's interest in this litigation, is set forth in a more detailed Statement of Interest of *Amici Curiae* appended to this brief. Petitioners and Respondents have consented to the filing of this brief in letters that are being filed with the Clerk's office. The undersigned counsel alone have authored this brief, and no person or entity other than *amici* has made a monetary contribution to its preparation or submission. *See* Sup. Ct. R. 37.

and are not required by the Establishment Clause. *Id.* at 395-97.

Amici assumed this ruling and its reasoning would prevent State officials from denying religious groups access to public facilities on the same terms as other community groups. Unfortunately, using a crabbed interpretation of *Lamb's Chapel*, some public officials and courts have systematically prohibited churches and other religious associations from holding programs in otherwise widely available public facilities.

The leading decision is *Bronx Household of Faith* v. *Community School District No. 10*, 127 F.3d 207 (2d Cir. 1997). There, the court held that such discrimination against religious groups can be justified on the ground that most programs run by churches do not present a religious "viewpoint" on a secular subject, but instead amount to "religious instruction or worship," which can be excluded on the basis of its "content."

The *Bronx Household* view has sprouted disturbing tendrils in at least two other circuits, where courts have approvingly cited the decision in excluding religious groups from publicly available facilities. *Campbell* v. *St. Tammany's Sch. Bd.*, 206 F.3d 482, 486 (5th Cir. 2000); *DeBoer* v. *Village of Oak Park*, 86 F. Supp. 2d 804, 810 (N.D. Ill. 1999). Rather than diminishing discrimination against religious groups' use of public forums, the *Lamb's Chapel* ruling has only caused public officials in these circuits to become more adept at excluding religiously-oriented programs.[2]

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[2] *Accord Saratoga Bible Training Instit.* v. *Schuylerville Cent. Sch. Dist.*, 18 F. Supp. 2d 178 (N.D.N.Y. 1998) (denying one-time use of high school auditorium for an "Answers in Genesis" Bible and science seminar); *Full Gospel Tabernacle* v. *Community Sch. Dist. 27*, 979 F. Supp. 214 (S.D.N.Y. 1997) (denying church's request to rent public school for Sunday services for one month).

To be sure, the dubious distinctions of *Bronx Household* have not been accepted by a number of circuits, which have prevented religious groups from being singled out for exclusion from public forums.[3] But, in a number of States, the *Bronx Household* approach jeopardizes the rights of religious persons and groups—whose members are, in general, taxpaying citizens of the States and communities in which they live—to use public facilities on an equal basis with similarly situated, yet secular, groups. It is high time to dismantle that approach and to reinforce the equal access principles of *Lamb's Chapel*.

SUMMARY OF ARGUMENT

The *Bronx Household* approach, which effectively excludes religion *per se* from public facilities, violates the Constitution for three separate reasons. First, it violates free speech principles. The exclusion of views based on their religious content is, in both principle and practice, a form of impermissible viewpoint discrimination. And because religion is a suspect constitutional class, it cannot be used, as it is in the *Bronx Household* doctrine, to define a categorical line of exclusion from a public forum. This is true whether the school facilities at issue are viewed as a limited public forum, as they were below, or as a designated full public forum for after-hours usage, as this Court's precedent would suggest.

Such an exclusion, moreover, is not justified by the Establishment Clause. Under a properly designed use policy, there will easily be enough separation between a religious group's activities and those of the public school to avoid, not

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[3] *Grace Bible Fellowship* v. *Maine Sch. Admin. Dist.*, 941 F.2d 45 (1st Cir. 1991); *Gregoire* v. *Centennial Sch. Dist.*, 907 F.2d 1366 (3d Cir. 1990); *Fairfax Covenant Church* v. *The Fairfax County Sch. Bd.*, 17 F.3d 703 (4th Cir. 1994); *Good News/Good Sports Club* v. *School Dist.*, 28 F.3d 1501 (8th Cir. 1994); *Church on the Rock* v. *City of Albuquerque*, 84 F.3d 1273 (10th Cir. 1996).

only State support for religion, but any message of endorsement. If anything, the *Bronx Household* approach itself infringes the Establishment Clause by sending an improper message of State hostility towards religion.

Second, the *Bronx Household* approach violates the Free Exercise Clause. It does so by specifically targeting religious activity for inferior treatment without any compelling interest or attempt to tailor the governmental policy to such an interest. See *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 546 (1993); *Employment Div.* v. *Smith*, 494 U.S. 872, 878 (1990). Moreover, the *Bronx Household* approach impermissibly burdens religious exercise in combination with other constitutional rights, including free speech and associational rights.

Third, not only are policies such as the one at issue here not *justified* by the Establishment Clause, but they also directly *violate* that Clause. Specifically, they impermissibly entangle church and State by requiring school officials to draw dubious and arbitrary distinctions between "religious viewpoint" and "religious instruction or worship."

Accordingly, the decision below should be reversed, and the *Bronx Household* doctrine rejected in favor of an approach that respects the constitutional right of religious people—whose taxes also pay for public facilities—to use public property on equal terms with other taxpayers, while complying with the legitimate constraints imposed by the Establishment Clause.

ARGUMENT

Our Nation has a rich tradition of providing religious groups with equal access to public facilities—a tradition that no doubt reflects the fact that the religious, no less than the irreligious, contribute to the support of those same facilities. Throughout our history, for example, communities have regularly allowed public schools to be used after hours for

religious purposes.[4] Indeed, this tradition is reflected in a once-popular television show, *Little House on the Prairie*, which regularly depicted Sunday church services being held in the community's one-room school.

The school policy at issue here departs from that tradition. As shown below, it does so in a way that flatly violates three separate provisions of the First Amendment: the Free Speech Clause, the Free Exercise Clause, and the Establishment Clause.

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[4] *See, e.g., Nichols* v. *School Dirs.*, 93 Ill. 61, 62, 64 (1879); *Davis* v. *Boget*, 50 Iowa 11, 15 (1878); *see also Southside Estates Baptist Church* v. *Board of Trs.*, 115 So. 2d 697, 698, 700-01 (Fla. 1959) (permitting public school to be "used temporarily as a place of worship during non-school hours"); *South San Antonio Indep. Sch. Dist.* v. *Martine*, 275 S.W. 265, 266 (Tex. Civ. App.) (indicating public school trustee permitted facilities to be used for "sectarian, political, and religious purposes"), *writ of error refused*, 277 S.W. 78 (Tex. 1925) (stating that petition failed to disclose an actionable abuse of discretion by school trustee); *State ex rel. Gilbert* v. *Dilley*, 145 N.W. 999, 999-1000 (Neb. 1914) (permitting occasional use of a schoolhouse as a place of worship on Sundays); *Hurd* v. *Walters*, 48 Ind. 148, 150 (1874) (noting that township act opened the schoolhouse "for other purposes than common schools" provided there are "equal rights and privileges to all religious denominations and political parties"); *State* v. *Kessler*, 117 S.W. 85, 85 (Mo. Ct. App. 1909) (noting that State statute "authorizes the use of schoolhouses 'for religious, literary or other public purposes'").

This has been true even in States with establishment clauses more restrictive than that in the U.S. Constitution. *See, e.g., Nichols*, 93 Ill. at 62-64 (permitting equal access where State constitution "forbid[s] . . . paying from any public fund whatever anything in aid of any church or sectarian purpose"); *Davis*, 50 Iowa at 15 (permitting equal access where State constitution provides no "person [shall] be compelled to pay tithes, taxes, or other rates for building or repairing places of worship"); *see also Southside Estates*, 115 So. 2d at 698-701; *Gilbert*, 145 N.W. at 999-1000.

I. THE EXCLUSION OF RELIGIOUS INSTRUCTION OR WORSHIP FROM PUBLIC FACILITIES OTHERWISE OPEN TO COMMUNITY GROUPS VIOLATES THE FIRST AMENDMENT'S FREE SPEECH CLAUSE.

This Court has long held that religious speech is owed the same constitutional protections and rights as secular speech.

> Our precedent establishes that private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression. Indeed, in Anglo-American history, at least, government suppression of speech has so commonly been directed *precisely* at religious speech that a free-speech clause without religion would be *Hamlet* without the prince.

Capitol Square Review & Advisory Bd. v. *Pinette*, 515 U.S. 753, 760 (1995) (citations omitted).

As applied to the States through the Fourteenth Amendment, the First Amendment's Free Speech Clause generally requires that States justify any restriction on the content or viewpoint of private speech in a "traditional public forum" by showing that the regulation in question "is necessary to serve a compelling State interest and is narrowly drawn to achieve that end." *Arkansas Educ. Television Comm'n* v. *Forbes*, 523 U.S. 666, 677 (1998) (quoting *Perry Educ. Ass'n* v. *Perry Local Educator's Ass'n*, 460 U.S. 37, 45 (1983)). Restrictions as to time, place, and manner of expression in such a forum must be content neutral, narrowly tailored to serve a significant government interest, and "leave open ample alternative channels of communication." *Perry Educ. Ass'n* v. *Perry Local Educator's Ass'n*, 460 U.S. 37, 45 (1983) (citations omitted).

This same standard also applies to public property that is not traditionally a public forum, but has been designated as such when a State, either "by policy or by practice," opens it

up to the public as a place for expressive activity. *Cornelius* v. *NAACP Legal Def. Fund*, 473 U.S. 788, 802 (1985); *Perry Educ. Ass'n*, 460 U.S. at 45. The government can limit such designated forums to certain classes of speakers or subject matter—thereby creating a "limited public forum"—as long as the limits are "reasonable and not an effort to suppress . . . the speaker's view." *Id.* at 46. However, if a government "excludes a speaker who falls within the class to which a designated public forum is made generally available, its action is subject to strict scrutiny." *Forbes*, 523 U.S. at 677.[5]

Both parties in this case have assumed that the Milford Central School ("Milford") is a limited public forum. (Pet. App. C12.) Thus, we first evaluate Milford's Community Use of School Facilities policy ("Policy") under the limited public forum doctrine. We then show that Milford has in fact created a full public forum for after-hours usage, and why its Policy violates the First Amendment under a full public forum analysis. Finally, we show why the exclusion of religious instruction or worship, under either of these standards, is neither required nor justified by the Establishment Clause.

A. Under The Principles Governing A Limited Public Forum, Milford Cannot, Absent A Compelling Interest Not Present Here, Use Religion As A Criterion To Define A Class Or Category Of Excluded Content.

Even analyzed under the less restrictive standards of a limited public forum, where classes of speech may be excluded on reasonable, viewpoint-neutral grounds, Milford's Policy

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[5] The Court has also defined a third category of public property forum known as the "nonpublic" or "selective access" forum. *Forbes*, 523 U.S. at 679-80. Here, however, no claim is made by either side, or in any lower court opinion, that Milford's access policy has turned its facilities into a non-public forum. Neither would evidence in the record appear to support such a claim if it were made.

violates the First Amendment. This is so for two independent reasons.

1. The exclusion of the Good News Club is in fact viewpoint discrimination. Other youth clubs that focus on morality and character building—including the Boy Scouts, the Girl Scouts, and the 4-H Club—are given access to the School's facilities. (Pet. App. A3.) Milford cannot keep out the Club merely because it addresses these same topics from a religious view.

To be sure, the *Bronx Household* approach attempts to justify such discrimination on the ground that it is based on content, not viewpoint, discrimination. But this distinction rests on a logical fallacy that posits that secular instruction and sectarian instruction must be two separate categories of content and cannot be two viewpoints on a similar topic.

The Tenth Circuit exposed the flaw in this reasoning in *Church on the Rock* v. *City of Albuquerque*, 84 F.3d 1273, 1279 (10th Cir. 1996). In that case, city-owned senior centers prohibited sectarian instruction within their facilities. The city defended the policy by arguing that it was viewpoint neutral, and that it excluded religion as a class of content and not as a viewpoint.

In rejecting this contention, the Tenth Circuit ruled that "any prohibition of sectarian instruction where other instruction is permitted is inherently non-neutral with respect to viewpoint." *Id.* The court explained that "instruction becomes 'sectarian' when it manifests a preference for a set of religious beliefs." *Id.* It concluded that "because there is no nonreligious sectarian instruction (and indeed the concept is a contradiction in terms), *a restriction prohibiting sectarian instruction intrinsically favors secularism at the expense of religion.*" *Id.* (emphasis added). Milford's restriction against religious instruction is similarly unconstitutional. Aside from its prohibition on religious instruction, it otherwise allows for "instruction in any branch of education," (Pet. App. D1),

thereby favoring secular instruction and viewpoints over religious ones.

The Fifth Circuit has noted as much. In commenting on this very case and the Milford Policy, it noted that "there is a powerful argument that such a prohibition against the use of facilities for a religious purpose is facially invalid as inevitably presenting a viewpoint discrimination." *Campbell* v. *St. Tammany Parish Sch. Bd.*, Nos. 99-31071, 99-31140, 2000 WL 1597749, at *17 (5th Cir. Oct. 26, 2000).

2. Even if Milford were able to articulate some coherent way of defining religion as content and not as a viewpoint, its Policy would still run afoul of the Free Speech Clause. That is because the government cannot define lines of exclusion by reference to a constitutionally-protected class—in this instance, that of religion. Such a definition amounts to an "elementary violation" of the First Amendment. *Grace Bible Fellowship* v. *Maine Sch. Admin. Dist.*, 941 F.2d 45, 48 (1st Cir. 1991) (noting that exclusion of religious groups from a public forum violates First Amendment).

To be sure, in a limited public forum public officials can regulate speech content with rules that are "reasonable in light of the purpose served by the forum and are viewpoint neutral." *Cornelius*, 473 U.S. at 806 (citing *Perry Educ. Ass'n*, 460 U.S. at 49). But, short of enforcing a compelling State interest, can a forum regulation ever be constitutionally "reasonable" if it draws a line of exclusion that is defined exclusively by reference to a constitutionally-suspect class?

This question is easily answered by considering a few examples. Under the Constitution, could a State official "reasonably" set up an expressive forum that was widely available to community groups or programs, excluding only groups of African-Americans, Native-Americans, or Irish-Americans? Could the State "reasonably" create a rule that excluded only programs run by, or that highlighted issues uniquely affecting, women? Absent something considerably

more than a rational basis, the government cannot single out such groups for exclusion. See *United States* v. *Virginia*, 518 U.S. 515, 546 (1996) (invalidating Virginia's "categorical exclusion" of women from the Virginia Military Academy because the State fell "'far short of establishing the "exceedingly persuasive justification"' that must be the solid base for any gender-defined classification") (internal citation omitted); *Loving* v. *Virginia*, 388 U.S. 1, 11 (1967) (concluding that anti-miscegenation statutes "rest solely upon distinctions drawn according to race" and are therefore unconstitutional); *Brown* v. *Board of Educ.*, 347 U.S. 483 (1954) (invalidating laws requiring and permitting racial segregation in public schools).

If any constitutionally-protected group is to be excluded from a limited public forum, it must be on the basis of constitutionally-neutral criteria that sweep more widely than any particular protected class. For example, a school could limit the use of its facilities to youth-oriented activities. While such a policy would exclude programs held by or for adult women, it would do so based on constitutionally-neutral criteria that also would exclude a wide range of unprotected groups, such as the Rotary club, the community garden club, or the local political forum. Similarly, a school could limit the after-hours use of its facilities to political activities. In such cases, programs dedicated to addressing gender issues or racial issues would be excluded, except to the extent that those programs also sponsored political activities.

But Milford has not used constitutionally-neutral criteria to exclude a general class of programs that simply happens to include religious programs. Rather, it has used the constitutionally-protected class of religion itself to define the line of exclusion.[6]

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[6] The Policy does so in two places. First, it starkly and globally forbids any use of school premises for "religious purposes." (Pet. App. D2.) No attempt is made to include religion with a number of other excluded uses or categories—the exclusion is made on the basis of religion alone.

Second, paragraph four, which allows for "meetings" and "events" charging admission fees, explicitly excludes such programs if held by a "religious sect or denomination." (Pet. App. D1.) While other secular organizations are also excluded under this section, the law on which the section is modeled, N.Y. Educ. Law § 414, excludes only religious groups from holding fundraising events. (Pet. App. C4-C5.) Neither version can be "reasonable" as a constitutional matter because they both draw an exclusionary line along the boundary of a constitutionally-protected class, albeit at varying levels of sophistication.

Under *Church of the Lukumi Babalu Aye* v. *City of Hialeah*, 508 U.S. 520 (1993) ("*Lukumi*"), "[a] law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny." *Id.* at 546. Thus, religion is a protected constitutional class that is necessarily entitled to the highest protection from laws that target religion for inferior treatment. *Id.* at 534 (condemning the use of "[o]fficial action that targets religious conduct for distinctive treatment"); see also *McDaniel* v. *Paty*, 435 U.S. 618 (1978) (state law disqualifying the clergy from public offices invalid because it imposed special disabilities on the basis of religious status).

Thus, any policy that singles out religion for exclusion cannot be "constitutionally reasonable," short of being justified by a compelling State interest. The only such interest that has been suggested in this context is the Establishment Clause. For the reasons articulated below, however, the Establishment Clause neither mandates nor justifies the Milford Policy or others like it.

B. Under The Principles Governing A Designated Full Public Forum, Milford Cannot, Absent A Compelling Interest That Is Not Present Here, Exclude Religious Groups Based On Either Viewpoint Or Content.

The Milford Policy also runs afoul of the requirements applicable to full public forums. In commenting on an access policy based on the same statutory scheme at issue here, this Court in *Lamb's Chapel* agreed there is "considerable force" to the argument that such regulations create a designated public forum. *Lamb's Chapel*, 508 U.S. at 391 (commenting on the uses permitted under N.Y. Educ. Law § 414).[7]

State officials can designate a public forum either "by policy or by practice." *Perry Educ. Ass'n*, 460 U.S. at 47. If a combination of "policy and practice" indicates that the government has opened up a public property to "the public at large for assembly and speech," the forum should be treated the same as a traditional public forum. *Cornelius*, 473 U.S. at 802.

Cornelius describes precisely the situation here. Milford has granted access to a number of other youth groups with purposes similar to that of the Good News Club. For example, the Boy Scouts, the Girl Scouts, and the 4-H Club all strive to inculcate values, morals, and even spiritual principles. (Pet. App. A12.) Further, the Milford superintendent testified that a wide range of community groups would be allowed to use school facilities for a variety of purposes, including political debates, Christmas programs, movie screenings, and moral instruction through literature such as Aesop's fables. (Pet. App. E4-E5.)

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[7] The Court did not have to decide that question in *Lamb's Chapel* because it found the restrictions at issue invalid even under the limited public forum standard.

Although a wider range of groups had used the facilities at issue in *Lamb's Chapel* than have used the facilities in this case, that fact is more than offset by Milford's adoption of a written access policy that is substantially broader than its counterpart in *Lamb's Chapel*. 508 U.S. at 391 n.5. Milford's Policy allows secular groups to use its facilities for seven of the purposes set out in N.Y. Educ. Law § 414. (Pet. App. D1-D2.) The school in *Lamb's Chapel* had adopted only two of those categories. *Lamb's Chapel*, 508 U.S. at 387. Beyond the "social, civic and recreational and entertainment events" authorized by the schools in both cases, Milford expressly allows for "instruction in any branch of education, learning or the arts." (Pet. App. D1-D2.) It also allows for "meetings [and] entertainment events." *Id.*

There are, moreover, no exclusions as to program content or subject matter, except of course as to religion. Because the Policy excludes religion from the forum, Milford officials appear to believe that the facilities qualify as only a limited public forum. But this cannot be correct. As the First Circuit remarked in a similar case, the fact that within the forum "anyone could be promoted except Jesus, [and] that all religions were excluded, did not mean that a broad access forum" became a "legally limited" forum. *Grace Bible Fellowship*, 941 F.2d at 47. Such an exclusion is not a reasonable regulation governing the use of a limited forum. Rather, it is nothing less than unconstitutional government "censorship." *Id.* at 48.

Indeed, the category of a designated public forum would lose all meaning if a State were able to change a full public forum into a limited forum merely by excluding one class of speech. The very idea of a designated general public forum is that the State cannot discriminate as to content without a compelling State interest. *Perry Educ. Ass'n*, 460 U.S. at 47. It is one thing for a State affirmatively to open a forum for a limited purpose or purposes, such as youth programs, or political debates, or civic business. But surely it cannot do

the reverse: open a forum for nearly all purposes and topics, exclude only a few topics—or one topic, as it has done here—and then expect the forum to be treated as a limited public forum. "Were it otherwise, a public body could unilaterally narrow a designated public forum so as to exclude disfavored groups, cynically circumventing the Supreme Court's public forum jurisprudence." *Campbell*, 2000 WL 1597749, at *26 (Jones, J., dissenting). Courts should not tolerate "[s]uch obvious machinations." *Id.*

Accordingly, this Court should hold that N.Y. Educ. Law § 414 and the Milford Policy create a general, open public forum for after-hours usage. The Court should also rule that the government cannot engage in viewpoint or content discrimination absent a compelling interest, which has not been asserted here.

C. The Establishment Clause Does Not Provide A Basis To Exclude Religious Instruction Or Worship Because, Under A Neutral And Properly Implemented Facilities Use Policy, Milford Neither Supports Nor Endorses Religion.

Establishment Clause concerns cannot justify the exclusion of a religious subset of taxpayers from equal access to their public facilities. As noted above, it has long been a common practice to allow religious groups to conduct services and meetings in public schoolhouses, even in States with restrictive State constitutional establishment clauses.[8] That practice

[8] *See* cases cited *supra* note 4; *see generally* C.T. Foster, Annotation, *Use of Public School Premises for Religious Purposes During Nonschool Time*, 79 A.L.R. 2d 1148, 1150 (1961 & 2000 Supp.) ("In pioneer times and during the era of the one-room country schoolhouse . . . it probably was not at all unusual, in many rural and village areas, for the residents of the neighborhood to use the public schoolhouse as a meeting place for many community nonschool purposes, during nonschool time. Sometimes the school building was used for holding Sunday church services or Sunday school meetings, or for evangelical or other religious meetings in the evenings, often because it was the only available building or hall in the community which could accommodate such a gathering.")

is fully consistent with the approach set out in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), under which the State must act with a secular purpose, its acts cannot have the primary effect of advancing or inhibiting religion, and it cannot act in a way that produces excessive entanglement between church and State.[9]

As to the first requirement: allowing public buildings to be used on the same terms as non-religious uses is not an impermissible legislative purpose. This Court long ago held that the creation of a public forum has a secular purpose, even if religious speech is allowed in that forum. *Board of Educ.* v. *Mergens*, 496 U.S. 226, 248 (1990); *Widmar* v. *Vincent*, 454 U.S. 263, 271 (1981). And, more generally, accommodating religion is also an acceptable secular purpose. See *Corporation of the Presiding Bishop* v. *Amos*, 483 U.S. 327, 338 (1987) (holding that a Title VII statutory provision that accommodates religion has a legitimate secular purpose); *accord Hobbie* v. *Unemployment Appeals Comm'n*, 480 U.S. 136, 144-45 (1987); *Wisconsin* v. *Yoder*, 406 U.S. 205, 235 n.22 (1972); *Walz* v. *Tax Comm'n*, 397 U.S. 664, 673 (1970). Moreover, as shown below in Section III, the policy at issue here does not avoid entanglement; it creates it.

Thus, if Milford's Policy is to be justified by Establishment Clause requirements, it can only be because of the *effect* that a contrary policy might have in advancing religion. But a properly crafted use policy would not have impermissible effects, and thus there is no Establishment Clause justification

[9] More recent decisions have tended to merge the last prong with the second prong, and the question of whether the government "endorses" or reasonably appears to "endorse" a religion has emerged as a key element of the second prong, especially in cases dealing with private speech in public or limited public forums. *Lynch* v. *Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring); *see Capitol Square Review*, 515 U.S. at 774-75; *Board of Educ.* v. *Mergens*, 496 U.S. 226, 250 (1990).

for Milford's Policy or for the underlying *Bronx Household* approach. See *Fairfax Covenant Church* v. *The Fairfax County Sch. Bd.*, 17 F.3d 703 (4th Cir. 1994) (Establishment Clause does not justify policy excluding religious groups from public school facilities); *Gregoire* v. *Centennial Sch. Dist.*, 907 F.2d 1366, 1380 (3d Cir. 1990) ("[G]ranting a religious organization permission to use school facilities does not imply an endorsement of religious goals.").

1. First, it is well settled that any benefit a religious group receives from equal access to a public forum is only "incidental" and does not "violate the prohibition against the 'primary advancement' of religion." *Widmar*, 454 U.S. at 273 (access to public university open forum only incidentally benefits religious student groups); *Mergens*, 496 U.S. at 248 (equal access to secondary school facilities does not impermissibly advance religion). This is because of the "crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Mergens*, 496 U.S. at 250.

In defending their Policy and the *Bronx Household* line of cases, Respondents ignore this crucial distinction. They rely heavily on reasoning drawn from cases involving *government actors* directly engaged in religious speech,[10] religious instruction occurring on school grounds *during the school day*,[11] and prayers at programs officially sponsored and run by *school officials*.[12] (Resp. Br. 8-10.) This case, however, is about *private actors* engaging in religious speech in a public forum *after the school day* at programs sponsored and run by a *private community group*. (Pet. App. E1-E2, H1-H2.)

[10] *Engel* v. *Vitale*, 370 U.S. 421 (1962).

[11] *McCollum* v. *Board of Educ.*, 333 U.S. 203 (1948).

[12] *Santa Fe Indep. Sch. Dist.* v. *Doe*, 530 U.S. 290 (2000); *Lee* v. *Weisman*, 505 U.S. 577 (1992).

Merely making a public forum available to the Good News Club for *private* religious speech does not amount to unconstitutional "support" for religion. *Lamb's Chapel*, 508 U.S. at 395; *Mergens*, 496 U.S. at 248; *Widmar*, 454 U.S. at 273.[13]

2. Nor would the Good News Club's proposed use violate the endorsement test set forth by the concurrence in *Capitol Square Review*, 515 U.S. at 777, 780. This test examines a number of factors to decide if the State's relationship to private religious speech would convey endorsement to a well-informed, reasonable observer. These factors include whether a religious group will "dominate a public forum," the "fortuity of geography," and the "nature of the particular public space." *Id.* at 777–78.

As to the first factor, absent some "empirical evidence that religious groups will dominate [an] open forum," a court cannot use forum domination to find State endorsement of religion. *Widmar*, 454 U.S. at 275. The "mere speculation" that use of a forum by a religious group over a period of time might "ripen into a violation of the Establishment Clause, absent any facts suggesting that probability, is not a justification sufficiently compelling to burden free access to the forum." *Fairfax Covenant Church*, 17 F.3d at 708.

In the present case, not only are the school facilities used by a number of different community-based youth groups, but they are also open to virtually all other types of community

[13] Indeed, a plurality in *Capitol Square Review* ruled that as long as forum access rules are truly neutral, "purely *private* religious speech connected to the State only through its occurrence in a public forum" can never offend the Establishment Clause. *Capitol Square Review*, 515 U.S. at 767. This neutrality approach to Establishment Clause concerns was recently supported by the plurality in *Mitchell* v. *Helms*, 120 S. Ct. 2530 (2000). The Good News Club's proposed use of Milford facilities would come well within this neutrality rule, as nobody has questioned the genuinely private nature of the Club's religious speech or the neutrality of its proposed access.

groups, except of course religious groups. There is no evidence or even claim that the Good News Club dominates, or is reasonably anticipated to dominate, Milford's facilities.

As to geography, nature of public space, and the time of the program: *Lamb's Chapel* gave four reasons why the display of a Christian film series in a public high school would not convey State endorsement. First, the film series was not shown "during school hours." Second, the showing was not "sponsored by the school." Third, the film series was "open to the public." Fourth, the school property had been used by "a wide variety of private organizations." *Lamb's Chapel*, 508 U.S. at 395. The proposed Good News Club meetings satisfy all these criteria. A wide range of community groups use, or are eligible to use, the facilities. (Pet. App. E4-E5.) The Club's meetings are open to all interested children (provided they gain their parent's permission), irrespective of their personal creed or ideology. (Pet. App. E1-E2.) The Club's meetings are not sponsored or otherwise supported by the school, and no teachers or other personnel from the school attend the meetings. (Pet. App. E2.)

Further, The Good News Club proposed to use Milford's facilities at 3 p.m. (Pet. App. C3.) The concern over the timing of a religious event is greatly diminished when the event takes place "after instructional hours when student attendance is no longer compelled." *Good News/Good Sports Club* v. *School Dist.*, 28 F.3d 1501, 1510 (8th Cir. 1994).

While the record does not indicate precisely when the Milford school day ends, even if it ends near 3 p.m. there would still be a sufficient separation between school activities and those of the Club to avoid the appearance of the Club's meetings being part of the school day. "Nothing in the first amendment postpones the right to religious speech until high school, or draws a line between daylight and evening hours." *Hedges* v. *Wauconda*, 9 F.3d 1295, 1298 (7th Cir. 1993). Here, the combination of (1) the change of location, from classrooms to cafeteria; (2) the change of personnel, from

school teachers to outside leaders; and (3) the change of audience, with a mixing of grade levels and the addition of children from outside the school provides the necessary break between the school day and Club meetings to avoid the appearance of government endorsement.[14]

In applying the rigid *Bronx Household* approach, the lower courts made no real inquiry into the connection between the activities of the school and those of the Club. Under the reasoning below, the outcome would have been no different if the Club had met at 5 p.m., or 10 p.m., or on the weekends. Likewise, it would not have mattered if the Club's activities had been for toddlers, teenagers, or twenty-somethings. Under *Bronx Household*, the religious nature of the activity absolutely barred the Club's religious use of any Milford facility, at any time, for anyone. Such a rule plainly goes beyond the demands of the Establishment Clause.

3. Respondents' concerns about "captive" child audiences do not alter this conclusion. All of the children at the Good News Club meetings attend voluntarily, and with parental permission. (Resp. Br. 25; Pet. App. E2.) Moreover, the argument that an elementary-aged audience is less capable of distinguishing between State neutrality and State endorsement than the presumably older audience in the *Lamb's Chapel* case is unpersuasive for two reasons.

First, while the audience for the Christian film series in *Lamb's Chapel* was largely comprised of teens and adults, it is likely that younger children also attended those meetings.

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[14] *Amici*'s use of public facilities has an even more attenuated link to school-day events or regular government business than is present in this case. That is because the use of public forums by *amici* will occur primarily on the weekends or later in the evenings, far removed from the hours of traditional government activity. Absent forum domination or preferential treatment, this type of use by religious groups falls well inside the constitutional boundaries set out in *Capitol Square Review* and *Lamb's Chapel*.

The Court did not express concern that younger children would be uniquely influenced by the religious films shown in the public forum. Other courts have shown similar regard for the ability of young children to distinguish between State speech and private speech. *Good News/Good Sports Club*, 28 F.3d at 1509 (eleven to 15-year-olds capable of discerning that religious club's activities from 3-4 p.m. on school grounds were not State speech); *Hedges*, 9 F.3d at 1298 (junior high school students can see that religious literature handed out immediately prior to and after class is private rather than State-sponsored speech).

Second, the argument of youthful impressionability is a double-edged sword. It defies common sense to conclude that, while young children might view a religious organization's use of public property as an endorsement from the State, they would not also perceive the organization's *exclusion* from those facilities as State *hostility* toward religion. When members of the Good News Club see the Boy Scouts, the Girl Scouts, and the 4-H Club use school facilities after hours, but they are forced to meet elsewhere because their Club—by reason of its religious affiliation—cannot meet on public property, they will inevitably perceive that "they are outsiders, not full members of the political community." *Lynch* v. *Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring). This is precisely the type of State-sponsored message that is prohibited by the Establishment Clause.

4. Indeed, for children as well as adults, the primary effect of the Policy is not to avoid endorsement, but to "demonstrate . . . hostility toward religion." *Rosenberger* v. *Rector & Visitors*, 515 U.S. 819, 846 (1995) (O'Connor, J., concurring) (citing *Mergens*, 496 U.S. at 248). It is well settled that "[t]he Religion Clauses . . . provide no warrant for discriminating *against* religion." *Board of Educ.* v. *Grumet*, 512 U.S. 687, 717 (1994) (emphasis added).

Stated differently, a message of government hostility toward religion is no more constitutionally permissible than a message of endorsement. "What is crucial is that a government practice not have the effect of communicating a message of government endorsement *or disapproval* of religion." *Lynch*, 465 U.S. at 692 (O'Connor, J., concurring) (emphasis added). As this Court explained in rejecting an Establishment Clause challenge to a policy allowing student religious clubs equal access to public high school facilities:

> [I]f a state refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but *hostility* toward religion. "The Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities."

Mergens, 496 U.S. at 248 (1990) (emphasis added) (quoting *McDaniel*, 435 U.S. at 641 (Brennan, J., concurring)).[15]

Milford's Policy categorically excludes religious programs from its facilities. Thus, the Policy "foster[s] a pervasive bias or hostility toward religion," and thereby "undermine[s] the very neutrality the Establishment Clause requires." *Rosenberger*, 515 U.S. at 845-46. Therefore, contrary to the flawed reasoning employed by the courts below, the

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[15] Moreover, although States are forbidden from expressing messages of either endorsement or hostility toward religion, a message of hostility is arguably of greater constitutional concern. That is because it is prohibited not only by the Establishment Clause itself, but also by the Free Exercise and Free Speech Clauses, which collectively insulate religious belief, practice, and expression from official criticism by a State orthodoxy. As this Court noted nearly 60 years ago, "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can describe what shall be orthodox in politics, nationalism, religion or other matters of opinion." *West Virginia State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 642 (1943).

Establishment Clause neither mandates nor justifies the Policy.[16]

II. THE EXCLUSION OF RELIGIOUS INSTRUCTION OR WORSHIP FROM PUBLIC FACILITIES OTHERWISE OPEN TO COMMUNITY GROUPS VIOLATES THE FIRST AMENDMENT'S FREE EXERCISE CLAUSE.

Policies such as that employed by Milford also violate the First Amendment's Free Exercise Clause. U.S. Const. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.").[17] Under this Court's decision in *Employment Division* v. *Smith*, 494 U.S. 872 (1990), laws that are neutral towards religion and generally applicable may usually be justified by a "reasonable" government purpose, even if they burden religious practice. See *id.* at 879. In sharp contrast, however, "[a] law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny." *Lukumi*, 508 U.S. at 546. The same is true of facially-neutral laws that burden other constitutional

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[16] If this Court nevertheless believes there is some question whether there is enough separation between the Club's meetings and the School, the Court should squarely reject the *Bronx Household* standard and then, if necessary, remand the case for adjudication under the proper standard.

[17] While Petitioners have focused on the free speech aspects of their First Amendment challenge, because the speech at issue here is religious speech, the resolution of this case necessarily implicates closely intertwined Free Speech, Free Exercise, and Establishment Clause jurisprudence. *See, e.g.*, *Mergens*, 496 U.S. at 250 (plurality opinion noting that "there is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect"). Further, this Court has previously considered arguments raised only in an amicus brief, *see, e.g.*, *Teague* v. *Lane*, 489 U.S. 288, 300 (1989) (plurality) (deciding case on the basis of a claim that was "raised only in an amicus brief"). The Court should do the same here given the important free exercise principles at stake.

rights in addition to religious freedom. *Smith*, 494 U.S. at 878, 881, 882. Policies such as the one at issue here violate the Constitution's Free Exercise Clause because, with no legitimate justification, they (1) single out religion for inferior treatment and (2) burden the exercise of rights in addition to freedom of religion.

1. This Court has always regarded laws that single out religion with the deepest suspicion. "A law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in the rarest cases." *Lukumi*, 508 U.S. at 546. As the Sixth Circuit noted, this Court "never intended *Smith* and *Lukumi* . . . to affect the methodology of dealing with those laws or rules that directly burden religion because they are not neutrally and generally applicable." *Hartmann* v. *Stone*, 68 F.3d 973, 978 (6th Cir. 1995). Laws that are not both neutral towards religion and generally applicable must be justified by "a compelling State interest and [must be] narrowly tailored to achieve that interest." *Lukumi*, 508 U.S. at 533; see *McDaniel*, 435 U.S. at 628-29.

In *Lukumi*, this Court found that local government restrictions on ritual animal sacrifice were neither "neutral" nor "generally applicable," as only religious animal killing was outlawed. *Lukumi*, 508 U.S. 536-37. Many other types of animal killing, including hunting and commercial slaughtering, were exempted from the regulations. *Id.* This Court concluded that no compelling interest had been shown, and thus struck down the regulatory scheme. *Id.* at 547.

In deciding whether a law is neutral towards religion, "we must begin with its text, for the minimum requirement of neutrality is that a law not discriminate on its face." *Id.* at

533. It is beyond dispute that "a rule that uniformly bans all religious practice is not neutral." *Hartmann*, 68 F.3d at 978.[18]

In this case, the text of the Milford Policy directly targets religion for inferior treatment: "School premises shall not be used by any individual or organization for religious purposes." (Pet. App. D2.) "Religious purposes" are the only objectives excluded by the Policy, and—like the supporting N.Y. Educ. Law § 414—therefore fall directly under the *Smith* and *Lukumi* prohibition against laws that target religion for inferior treatment.

2. An alternative reason to apply the compelling State interest test is that the Milford Policy burdens a combination of rights. As this Court explained in *Smith*, when even a neutral, generally-applicable law burdens "the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press" the Constitution requires the application of the compelling interest test. *Smith*, 494 U.S. at 881, 882.

Milford's treatment of the Good News Club presents a "hybrid situation" in which several rights are involved. Here, the Club's free exercise, free speech, and assembly rights are all implicated. *Widmar*, 454 U.S. at 273 n.13 (claim to use public forum also "implicates First Amendment rights of speech and association"). For this further reason, the compelling interest analysis should apply.

3. The only proffered justification for the inferior treatment of religion in Milford's Policy has been an alleged "reasonable" need to comply with the Establishment Clause. (Pet. App. C14.) The problem with this argument is that the

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[18] In *Hartmann*, Army regulations prohibited on-base, in-home day-care providers, selected at the parents' choice and expense, "from having any religious practices, such as saying grace or reading Bible stories, during their day-care program." The court found it "beyond peradventure" that the regulations were neither neutral nor generally applicable. *Hartmann*, 68 F.3d at 975, 978.

State must show more than a "reasonable interest" to discriminate against religion. As discussed above, it must show a "compelling state interest," and it must show that its restrictions are narrowly tailored to meet that interest.

Neither Milford nor New York has made either showing. For the reasons stated in section I(C) above, the Establishment Clause does not require all religious activity to be excluded from Milford's facilities. If some specific aspect of the Club's proposed use of the facilities creates too strong a connection between the School and the Club, Milford should explore less restrictive alternatives short of absolute exclusion to strengthen the separation between the two entities. But Milford has not explored less restrictive means of addressing such concerns. The Policy therefore violates the free exercise rights of the Good News Club.

III. MILFORD'S POLICY EXCESSIVELY ENTANGLES CHURCH AND STATE BY REQUIRING OFFICIALS TO DRAW DUBIOUS DISTINCTIONS BETWEEN RELIGIOUS INSTRUCTION AND SECULAR INSTRUCTION PRESENTED FROM A RELIGIOUS "VIEWPOINT."

Perhaps the most troubling feature of Milford's Policy, and the *Bronx Household* approach on which it is based, is its requirement that State officials scrutinize proposed religious events to decide if they are "merely" the presentation of a religious viewpoint or if they consist of forbidden religious instruction or worship. (Pet. App. A16); *Bronx Household*, 127 F.3d at 214-15. This creates an entanglement of church and State that has long been an Establishment Clause concern.

Distinguishing between even the broad categories of viewpoint and content is itself very difficult, as viewpoint discrimination "is but a subset or particular instance of the more general phenomenon of content discrimination." *Rosenberger*, 515 U.S. at 830-31. But, especially in the realm of religion, "the distinction is not a precise one . . . [for while]

religion may be a vast area of inquiry, . . . it also provides . . . a standpoint from which a variety of subjects may be discussed and considered." *Id.* at 831.

Deciding where viewpoint ends and content begins in the highly sensitive area of religious activity will inevitably involve State officials in highly intrusive and subjective inquiries into the realm of religion. There is "no more disrupting influence apt to promote rancor and ill-will between church and State than this kind of surveillance and control. They are the very opposite of the 'moderation and harmony' between church and State which Madison thought was the aim and purpose of the Establishment Clause." *Lemon*, 403 U.S. at 637 (Douglas, J., concurring).

This Court dealt with the entanglement problems created by a very similar distinction in *Widmar*. There, the dissent tried to draw a distinction between allowing religious speech as opposed to religious worship into a public forum. *Widmar*, 454 U.S. at 283-84. The majority opinion was highly critical of this distinction and rejected it on four grounds, all of which also apply to the *Bronx Household* approach. *Id.* at 270, 272 n.11.

First, the distinction between religious worship and speech lacks "intelligible content," providing insufficient notice of what is prohibited. As noted in *Widmar*, it is virtually impossible to define the point at which forms of religious speech—such as singing, teaching, and reading—metamorphose into worship. *Id.* at 270. In this case it is equally difficult to locate the line, assuming it exists, between speech from a religious viewpoint, which is permitted under Milford's Policy, and religious instruction or worship, which is not. Much religious instruction concerns matters that are viewed as secular, including family matters, sexual behavior, business relationships, and other general ethical matters. The Biblical books of Proverbs, Ecclesiastes, Romans, and James, as well as Jesus' teachings in the Sermon on the Mount, attest to this fact.

How then would a government official determine whether a lesson on the Apostle Paul's teachings about sexual conduct constitutes speech from a religious viewpoint, or impermissible religious instruction? How would that official categorize a classical vocal rendition of the "Lord's Prayer," a piece of music viewed by some as high culture, by others as religious instruction, and by still others as adoration and worship? While an official may attempt to evaluate these presentations based on the style, manner, and tone of delivery, doubtless the decision would ultimately depend on the official's own religious viewpoint. There simply are no neutral, logically compelling, objective principles on which to base a decision.

In short, the distinctions required by the *Bronx Household* approach do not make sense practically, theologically, philosophically, or legally. As this Court has previously recognized, any attempt "to determine which words and activities fall within 'religious worship and religious teaching' . . . could prove 'an impossible task in an age where many and various beliefs meet the constitutional definition of religion.'" *Widmar*, 454 U.S. at 272 n.11 (internal cites omitted).

Second, even if such distinctions had any meaning as a theoretical matter, the process of making them would be highly intrusive. Indeed, as this Court recognized in *Widmar*, "[m]erely to draw the distinction would require" a public official "to inquire into the significance of words and practices to different religious faiths, and in varying circumstances of the same faith. Such inquiries would tend inevitably to entangle the State with religion in a manner forbidden by our cases." *Id.* at 270.

The intrusion inherent in such inquiries is aptly illustrated by the manner in which the lower courts have scrutinized the activities of the Good New Club in this case. The Second Circuit claimed that "it is not difficult for school authorities to make the distinction between the discussion of . . . a religious viewpoint and the discussion of . . . religious instruction and

prayer." (Pet. App. A16.) Yet, in drawing this supposedly simple distinction, the lower courts spent between one third to one half of their opinions closely examining and weighing each activity of the Club for its religious significance. (See Pet. App. A3-A10, A15-A18, C15-C24, C31.) After culling through the details of songs and scripture reading, memory lessons and missionary stories, the Second Circuit disapprovingly opined that the "Good News Club goes far beyond merely stating its viewpoint. The Club is focused on teaching children how to cultivate their relationship with God through Jesus Christ." (Pet. App. A17.) This is just the kind of intrusive analysis and negative judgment on religious views that created concern in *Widmar* about standards beyond "the judicial competence" of public officials. *Widmar*, 454 U.S. at 270.

Third, even if the distinction drawn in *Bronx Household* had a basis in logic and did not require an offensively intrusive inquiry into religious matters, enforcing that distinction would create its own problems. Here, as in *Widmar*, there would be a "continuing need to monitor group meetings to ensure compliance with the law," representing an almost insurmountable entanglement problem. *Widmar*, 454 U.S. at 272 n.11.

Making the distinction required by *Bronx Household*, insofar as it is meaningful, will turn on the manner in which songs, readings, or other religious utterances are expressed. But who will ensure that the conductor of the Christmas choir does not break out into "forbidden" prayer before or after the concert? Who will stand guard to prevent the discussion on life's origins from "degenerating" into a call to trust in the Great Creator? Who will restrain the faithful at a gospel music concert from breaking out in fervent—yet "illicit"—"Hallelujahs," "Amens," and "Praise the Lords," or from merely bowing their heads in quiet prayer?

But even if making and monitoring such distinctions did not present enormous practical difficulties, it is not at all

obvious why they should have any constitutional significance. As the *Widmar* Court asked, why would the Constitution "require different treatment for religious speech designed to win religious converts . . . than for religious worship by persons already converted[?]" *Id.*

So too here. The *Bronx Household* approach allows speech on "secular" topics from a religious viewpoint, even though such speech is often used in Christian apologetics with the aim of winning converts to a religious viewpoint. Examples of this are Biblical viewpoints on history, archaeology, and questions of the origins of life and the universe. Yet, the *Bronx Household* approach would ban similar speech if it were presented as worship for the already converted. Here, as in *Widmar*, there is no sound constitutional reason to treat the two differently.

In sum, as in *Widmar*, the *Bronx Household* approach requires distinctions founded on unintelligible criteria in an area beyond the competence of public officials. It raises insurmountable problems of enforcement. It creates distinctions of no clear constitutional relevance. And it is forbidden, not required, by the Establishment Clause.

* * * * *

The effect of the *Bronx Household* approach is to diminish and severely limit this Court's ruling in *Lamb's Chapel* outlawing religious discrimination in access to public forums. That approach has denied a wide range of religious groups, including the Good News Club, access to public facilities that are otherwise available to almost every other type of community group imaginable. Such exclusions are unconstitutional, and the rule on which they are based should be rejected in favor of an approach that accommodates the rights and desires of religious people to use public property on equal terms with other taxpayers, consistent with legitimate Establishment Clause guidelines.

CONCLUSION

For the foregoing reasons, as well as those set forth in petitioners' brief, the decision below should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX

STATEMENTS OF INTEREST

The African Methodist Episcopal Zion Church

The African Methodist Episcopal Zion Church, also known as the A.M.E. Zion Church, was founded in 1796, and is headquartered in Charlotte, North Carolina. A.M.E. Zion Church members share a common heritage with Christians of every age and nation according to the witness and teachings of the Apostles of Jesus Christ. The Church has a membership of approximately 1.5 million and has a vested interest in ensuring that its members and local congregations have equal access to public facilities.

The American Muslim Council

The American Muslim Council (AMC) was established in 1990 to increase the effective participation of American Muslims in the American public square. The American Muslim population, estimated at seven million, comprises Americans of all races and ethnic backgrounds. Because American Muslim organizations, like other Christian, Jewish, and secular organizations that are part of American civil society, frequently take advantage of programs that make space in schools and other public buildings available for rent when they are not in use for their primary purposes, AMC has a deep interest that such programs not be biased against organizations whose activities are, or may be perceived as, religious in nature.

The Baptist Joint Committee on Public Affairs

The Baptist Joint Committee on Public Affairs is composed of representatives from various national and regional cooperating Baptist conventions and conferences in the United States. The Baptist Joint Committee's supporting bodies include: Alliance of Baptists; American Baptist

Churches in the U.S.A.; Baptist General Conference; Cooperative Baptist Fellowship; National Baptist Convention of America; National Baptist Convention, U.S.A., Inc.; National Missionary Baptist Convention; North American Baptist Conference; Progressive National Baptist Convention, Inc.; Religious Liberty Council; Seventh Day Baptist General Conference; and Southern Baptists through various state conventions and churches. Many Baptist congregations meet in public school facilities after hours while their worship centers and education buildings are being constructed or renovated. Because of the congregational autonomy of individual Baptist churches, the Baptist Joint Committee does not purport to speak for all Baptists.

The First Church of Christ, Scientist

The First Church of Christ, Scientist, in Boston, Massachusetts, is "The Mother Church" of one of the major indigenous American religious denominations—Christian Science. The Church and its branch Christian Science churches and societies are collectively referred to as the Church of Christ, Scientist. There are more than 2,000 local Christian Science congregations existing in over sixty-five countries and in all fifty states and the District of Columbia. At least one of the local congregations currently meets in a public school. The Church is aware that a number of other congregations met in public facilities on an interim basis before obtaining their own buildings or private space. The First Church of Christ, Scientist, seeks to advance and preserve religious rights for all.

The General Assembly of the Presbyterian Church (U.S.A.)

Clifton Kirkpatrick, as Stated Clerk of the General Assembly, is the senior continuing officer of the highest governing body of the Presbyterian Church (U.S.A.). The Presbyterian Church (U.S.A.) is the largest Presbyterian denomination in the United States, with approximately

2,700,000 active members in 11,500 congregations organized into 173 presbyteries under the jurisdiction of 16 synods.

The General Assembly does not claim to speak for all Presbyterians, nor are its deliverances and policy statements binding on the membership of the Presbyterian Church. The General Assembly is the highest legislative and interpretive body of the denomination, and the final point of decision in all disputes. As such, its statements are considered worthy of the respect and prayerful consideration of all the denomination's members.

Through its General Assembly, as its highest governing body, the Presbyterian Church has often spoken about religious expression in public places. In 1988 the General Assembly adopted a comprehensive policy on religious liberty entitled "God Alone Is Lord of the Conscience." In that policy the General Assembly said: "Religious speech and assembly by private citizens and organizations, initiated by them, is protected both by the Free Exercise of Religion and Free Speech Clauses of the Constitution and cannot be excluded from public places." That same Assembly continued: "If public . . . schools permit genuinely extra-curricular student initiated group activities in noninstructional time, religious expression should be permitted subject to the same regulations and restrictions."

The school board policy at issue in this case clearly falls outside those parameters. Religious Expression is the only use explicitly prohibited by that policy. Surely such a policy does not pass Constitutional muster. The Stated Clerk urges this Court to protect the rights guaranteed by the First Amendment for all religious persons in New York State.

The General Board of Church & Society of The United Methodist Church

The General Board of Church and Society of The United Methodist Church (the "General Board") is the public policy and social action agency of The United Methodist Church.

The primary responsibility of the General Board is to seek the implementation of the Social Principles and the Resolutions of The United Methodist Church. The United Methodist Church asserts the rights of all religions and their adherents to freedom from discrimination (Social Principles, Par. 66.III.B). Consistent with its mission, the General Board opposes any action of government that discriminates and denies access to public buildings because of the religious character of a program. Many United Methodist groups and churches use public school facilities for services and instruction after school hours. The General Board believes that any religious group should have the same access that other civic organizations have to school facilities.

The General Conference of Seventh-day Adventists

The North American Division of the General Conference of Seventh-day Adventists administers the work of the Seventh-day Adventist Church in the United States, Canada, and Bermuda, and represents more than 4,700 congregations with nearly 900,000 members. The Church strongly supports the twin concepts of the free exercise and non-establishment of religion and actively promotes those ideals through its bi-monthly *Liberty* magazine.

The Church's Working Policy points out "that religious liberty is best achieved, guaranteed and preserved when church and government respect each other's proper areas of activity and concern" and that "in matters where secular and religious interests overlap, government, in the best interests of both church and government, must observe strict neutrality in religious matters, neither promoting nor restricting individuals or the Church in the legitimate exercise of their rights."

The Church believes that public-school districts are not neutral in religious matters when they permit all but religious groups to use school facilities after hours. It believes that such unequal treatment violates both Equal Protection and First Amendment guarantees of the federal Constitution.

The National Council of Churches

The National Council of Churches, also known as The National Council of the Churches of Christ in the USA, is a community of 36 Protestant and Orthodox communions having an aggregate membership in the United States of over fifty million. Its positions on public issues are taken on the basis of policies developed by its General Assembly, composed of some 270 members who are selected by member communions in numbers proportionate to their size. Groups within the member communions of the National Council of Churches have used public school facilities, after school hours, for religious programming, and would be interested in maintaining that access.

The Reorganized Church of Jesus Christ of Latter Day Saints

The Reorganized Church of Jesus Christ of Latter Day Saints ("RLDS Church") is a Christian Church with world headquarters located in Independence, Missouri. The RLDS Church follows doctrines based upon the teachings of Jesus Christ, and its organization follows patterns of the New Testament Church. The RLDS has members and congregations in every state of the Union and in over 37 countries. The RLDS Church has local congregations which utilize public facilities, and conduct or participate in activities which utilize public facilities. The Church would like to preserve its ability to use such facilities on an equal basis with other, secular groups.